

### **REMARKS**

Claims 3-6 have been added. No new matter has been presented. Upon entry of this amendment, claims 1-6 will be pending in this application.

Applicant does not find in the record any indication that the Examiner has considered the Information Disclosure Statement (IDS) filed on February 10, 2006. Accordingly, it is respectfully requested that the Examiner enter into the record the Form PTO/SB/08 associated with this IDS with the associated references initialed by the Examiner to indicate their consideration.

Claims 1 and 2 remain rejected under 35 USC 103(a) on Young (US 7,011,658) in view of Nicosia (US 6,729,515). This rejection is respectfully traversed.

Claim 1 recites a bone spreader having two tubular pin holders configured to receive pins that are axially introduced into the pin holders. This aspect of the claimed invention is neither disclosed nor suggested by the cited references.

The Examiner relies on Young as teaching the claimed pin holders. However, the portion of Young on which the Examiner relies for this teaching, elements A1 and A2 of FIG. 5, does not disclose elements of a bone spreader as claimed. Rather, elements A1 and A2 are elements of screws with fixed U-shaped heads that engage with extension/retraction device 30. Since elements A1 and A2 are anchors configured to be connected to vertebrae, they do not hold pins and are not configured to receive pins that are axially introduced into them. There is no disclosure in Young of a bone spreader having tubular pin holders as required by claim 1.

The Examiner also declines to accord patentable weight to the limitation "axially introduced into the pin holders" because the Examiner indicates that this limitation amounts to a product-by-process limitation. This is not correct. A product-by-process claim is a product claim that defines a claimed product in terms of the process by which it is made. See MPEP 2173.05(p). In contrast, claim 1 recites two tubular pin holders that are "configured to receive two pins that are axially introduced into the pin holders." This limitation further defines the

structure of the claimed pin holders, and does not define a process by which the claimed pin holders are made. Accordingly, this limitation must be accorded patentable weight. Young provides no disclosure or suggestion that extension/retraction device 30 has tubular pin holders, much less tubular pin holders that are configured to receive pins that are axially introduced into the pin holders.

Further, for at least the reasons provided in the July 25, 2008 Amendment and incorporated herein by reference, the claimed invention would not have been obvious over Young in view of Nicosia. Even if Young and Nicosia were combined as proposed by the Examiner, the proposed combination would not result in the claimed invention. In particular, Young provides no disclosure or suggestion of any mechanism to secure screws A1 and A2 to extension/retraction device 30. Rather, the only locking mechanism disclosed in Young acts to restrict the extension and/or retraction of engagement ends 36 and 64 of device 30. Thus, replacing this locking mechanism in Young with the locking mechanism in Nicosia, as proposed by the Examiner, would not provide a locking device for a pin as required by claim 1.

Accordingly, since Young does not provide the teachings for which it is cited, and the cited references do not disclose or suggest the elements required by claim 1, the rejection of claim 1 and claim 2 depending thereon should be withdrawn.

In light of the above, early action allowing claims 1-6 is solicited.

In the event the Patent and Trademark Office determines that an extension and/or other relief is required, Applicant petitions for any required relief including extensions of time and authorizes the Commissioner to charge the cost of such petitions and/or other fees due in

connection with the filing of this document to Deposit Account No. 03-1952 referencing docket no. 246472009300.

Respectfully submitted,

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